Lim Hin Hock v Ong Jin Choon & Anor and another appeal

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NOS 116 OF 1987 AND 117 OF 1987
YONG PUNG HOW CJ, LAI KEW CHAI AND CHAO HICK TIN JJ
27 FEBRUARY 1991

Tort — Negligence — Road accident — Liability of motor-cyclist to injured pedestrian — Failure to slow down — Inference of motor-cyclist's refusal to give way to taxi filtering — Appeal against trial judge's decision

Road Traffic — Negligence — Collision between motor-cycle and taxi — Liability for damages to injured pedestrian

Damages (Personal Injury or Death) — Road accident — Loss of earnings

These were two appeals against the decision of the trial judge that the first defendant, a motor-cyclist, was one-third liable and the second defendant, a taxi driver, was two-thirds liable for injuries suffered by the plaintiff, a pedestrian, as a result of the collision between the first defendant's motor-cycle and the second defendant's taxi and further, that the sum of $48,629.19 damages be awarded for the plaintiff's loss of earnings. See [1988] 3 MLJ 137.

The first appeal was by the first defendant against the second defendant in regard to the trial judge's decision on apportionment of liability between the first and second defendants and on the quantum of damages awarded to the plaintiffs for loss of earnings. The second appeal was by the second defendant in regard to the latter issue only.

The plaintiff was waiting at a taxi stand when he suffered personal injuries as a result of the collision of the second defendant's taxi with the first defendant's motor-cycle while filtering to his right from the second lane to the first lane, which then collided into the plaintiff.

In regard to the first issue of apportionment of liability, the first defendants contended that the trial judge was wrong in disregarding the evidence of the plaintiff who was an independent witness and that there was no evidence that the first defendant was speeding or failed to apply his brakes to slow down. The first defendant further argued that the trial judge did not make a specific finding of fact but a mere inference. He argued that the appellant court would be in as good a position as the trial judge to draw the proper inference though due weight should be given to the views of the trial judge.

In regard to the second issue of quantum of damages for the plaintiff's loss of earnings, the second defendant argued that the salaries received by the plaintiff during the period he was incapacitated owing to injuries as a result of the accident was received by him as of right. As such the plaintiff is not entitled to claim further sums from the defendants.

The first defendant contended that the amounts paid to the plaintiff did not accurately reflect the true worth of the services rendered by the plaintiff's two companies, of which the plaintiff was an executive director, and he effectively controlled it. The contention was that the more appropriate way of determining the loss suffered by the plaintiff should be based on the business lost by the two companies on account of the absence of the plaintiff.

Held, dismissing the appeals.

(1) On the issue of apportionment of liability the trial judge was not wrong to have disregarded the first defendant's evidence because he may not have thought that it was completely accurate. On the facts, the second defendant's version of the circumstances leading up to the accident was more likely to be correct.

(2) Although the second defendant was negligent because he did not keep a look-out for vehicles travelling on his right, the first defendant was also negligent in that he was travelling much faster than the speed which he indicated and he did not apply his brakes to slow down.

(3) The inference of the trial judge that the first defendant refused to give way to the second defendant when the latter tried to filter into the first lane and instead attempted to overtake the second defendant's taxi on the right was affirmed.

(4) The salaries paid to the plaintiff were not as of right but were only advances made by the companies to him. Therefore he was entitled to his salary loss as a result of the incapacity caused by the accident.

Cases referred to

1 *Benmax* v *Austin Motors* [1965] 1 All ER 326 (refd)
2 *Cunningham* v *Harrison* [1973] 1 QB 942 (folld)
3 *Esso Petroleum* v *Mardon* [1976] QB 801 (distd)
4 *Lee* v *Sheard* [1955] 1 QB 192 (distd)

Appeal from: Suit No 750 of 1982 (High Court, Singapore)

Benedict Chan for the first defendant (appellant in Civil Appeal No 116 of 1987).

Michael Kuah for the second defendant (second respondent in Civil Appeal No 116 of 1987 and appellant in Civil Appeal No 117 of 1987).

K Balachandran for the plaintiff (first respondent in Civil Appeal No 116 of 1987 and respondent in Civil Appeal No 117 of 1987).

Cur Adv Vult

Chao Hick Tin J (delivering the judgment of the court): These two appeals arose out of a decision of the High Court which held that the first defendant was one-third and the second defendant two-thirds to blame for an accident which occurred along Cecil Street, in front of the then Singapore Turf Club. Before the learned trial judge the parties had agreed on a sum of $9,471.03 for special damages which consisted mainly of medical expenses and another sum of $17,500 as general damages for the injuries suffered by the plaintiff. In addition the learned judge also awarded the plaintiff a sum of $48,629.19 representing special damages for loss of earnings during the period he was incapacitated. [See [1988] 3 MLJ 137.]

The first defendant had appealed against that part of the judgment of Thean J which held that he was liable to the extent of one-third for the accident and also against that part of the judgment allowing the plaintiff's claim for loss of earnings at $48,629.19. The second

defendant had appealed only against that part of the decision relating to the sum of $48,629.19 being the loss of earnings.

Therefore the appeals raised only two issues. First, was the learned judge correct in finding that the first defendant was one-third to blame for the accident. Second, was the learned judge correct in holding that the plaintiff was entitled to a sum of $48,629.19 being loss of earnings. Having heard submissions from the parties we dismissed the appeals with costs and affirmed the decision of the learned judge. We now give our reasons.

On March 1979 at about 4pm the plaintiff was waiting for a taxi at the taxi-stand in front of the then Singapore Turf Club at Cecil Street, which was a one-way street. A collision occurred between a taxi driven by the second defendant and a motor-cycle ridden by the first defendant which resulted in the motor-cycle being thrown forward and colliding into the plaintiff who was then standing at the taxi stand. In so far as the plaintiff was concerned he was clearly an innocent party.

The evidence of the first defendant was that at the relevant time both the taxi and the motor-cycle were travelling on the second lane of Cecil Street from the right, as one faces in the direction of Collyer Quay. The first defendant said that his motor-cycle was slightly behind the taxi but he was riding very close to the line dividing the first and the second lanes. He alleged that he was then riding at a speed of between 35 and 40 kmph. There was a van parked on the first lane, about seven to eight car lengths before the taxi-stand. After passing the van and just before the taxi-stand, the taxi suddenly swerved right into the first lane. He braked but could not avoid the collision. The taxi did not give any signal that it was going to switch lanes.

The second defendant in his evidence said that he was then carrying three passengers from the World Trade Centre to the Singapore Turf Club. He was instructed to do so at the commencement of the journey. He was travelling on the second lane intending to stop at the taxi-stand. He said that there was a motor-van parked on the first lane at about 10m before the taxi-stand. He gave the right-hand signal showing that he would be moving towards the taxi-stand well before he passed the motor-van. Having passed the van and as he was swerving to the right lane towards the taxi-stand a motor-cycle came from behind and attempted to overtake him on the right. He applied his brakes but could not avoid the collision. The second defendant said that before he swerved to the first lane he did look into the rear-view mirror but did not see the motor-cycle.

The learned judge found that the second defendant was negligent because he did not keep a proper look-out for vehicles travelling on his right. However, the learned judge also found that the first defendant was also negligent. He found that the first defendant was travelling much faster than the speed which he indicated; neither did he apply his brakes to slow down. From all the circumstances the learned judge drew the inference that the motor-cyclist refused to give way to the taxi when the latter tried to filter into the first lane and instead attempted to overtake the taxi on the right. It was as a result of this manoeuvre that the accident occurred.

Counsel for the first defendant submitted that the learned judge was wrong in his findings because he took no account of the evidence of the plaintiff, whom counsel said was an independant witness. He also argued that there was no evidence that the first defendant was speeding or that he did not apply his brakes to slow down. Accordingly there was no basis for the trial judge to say that the appellant refused to give way to the taxi and instead attempted to overtake the taxi. He contended that this was not a finding of specific fact but a mere inference and an appellate court was in as good a position as the trial judge to draw the proper inference, though due weight should be given to the views of the trial judge: see *Benmax* v *Austin Motors*.[1] Emphasis was also placed by the first defendant on the police report made by the second defendant and the statement of facts admitted to by the second defendant in the criminal proceedings taken against him as a result of the accident.

It was true that in his grounds of decision the learned judge did not refer to the evidence of the plaintiff. The plaintiff said that as he was standing at the taxi-stand he was then looking towards his left. The taxi and the motor-cycle were coming towards him. The motor-cycle was on the right-hand side of the taxi. The taxi was travelling on the second lane and the motor-cycle was travelling in the first lane, close to the white line dividing the first and the second lanes. He said the position of the motor-cycle was somewhere in the middle of the front off-side door of the taxi. When the taxi was about 10 to 20m away from the plaintiff, it swerved to the right and as a result collided with the motor-cyclist. He said the taxi did not give any signal before swerving to the right; in any event there would have been no time for the motor-cyclist to apply his brakes.

We think the learned judge did not place any reliance on the account given by the plaintiff as to how the accident occurred because he must have thought that the evidence was not completely accurate. We noted the following difficulties with the plaintiff's evidence. First, the plaintiff did not even notice the van which was parked by the side of the road on the first lane. Both the two defendants clearly said that the van was there. They differed only on the distance of the van from the taxi-stand. The presence or absence of the van seemed to us to be a relevant factor. Second, if he did not even notice the van which was parked nearby it did not seem likely

that he would have noticed the signal of the taxi, if given. For reasons given in the next paragraph we were of the view that the van was parked close to the taxi-stand. Third, the plaintiff's evidence regarding the position of the motor-cycle vis-a-vis the taxi was different from that given by the motor-cyclist (first defendant) himself, who said that he was directly behind the taxi and could even see the rear lights of the taxi. In view of these, we did not think that it was wrong of the learned judge to have disregarded the evidence of the plaintiff as to how the accident occurred.

The first defendant said that the van was parked seven to eight car lengths before the taxi-stand. If so, why should he still ride so close to the line separating the first and second lanes. He should have, after passing the parked van, moved into the first lane proper. The fact that up to the point immediately before the accident he was still riding very much along or close to the line dividing the first and the second lane suggested to us quite clearly that the van must have been parked pretty close to the taxi-stand and was blocking a substantial part of the first lane. According to the second defendant the van was parked about ten metres before the taxi-stand. We thought that was more likely to be correct.

Though the learned judge did not specifically state that he accepted the second defendant's evidence that he did give a signal before swerving to the first lane, it seemed to us that was clearly implied when he found that the first defendant 'probably refused to give way to the taxi switching to his lane'. The first defendant could not have refused to give way unless a signal was given by the taxi-driver. As regards the point that the second defendant's police report did not mention anything about giving a signal, we noted that he had given his explanation in evidence and the court was clearly entitled to accept it.

Considering all the circumstances we did not think that the finding made by the learned judge against the first defendant was wrong; indeed we were of the opinion that he was right.

We now turn to the second issue relating to the award of $48,629.19 for loss of earnings. It was not in dispute that for the period from 5 March 1979 to 15 July 1980 (hereinafter referred to as the 'relevant period') the plaintiff was unable to go to work. He was at the material time a director of two family companies, namely, Pan Asian Services Pte Ltd ('PAS') and Seagull Marine Services Pte Ltd ('SMS'). He was also the chairman of the board of directors of both companies. In PAS he was the majority shareholder and the rest of the shares were held by his children. In SMS the shares were held equally between him and his son, one Ong Ee Keng. The learned judge found that the plaintiff controlled both the companies.

Prior to the accident, the plaintiff was a working director and for his services he drew a salary of $2,000 a month from PAS and $500 from SMS. In addition to these salaries, the companies also paid to him as a director and shareholder, director's fees and dividends. During the relevant period the plaintiff continued to draw his salaries from the two companies; in the case of PAS, up to May 1981 and in the case of SMS, up to June 1980. He said that he continued to draw the salaries from the two companies because he required them for his livelihood. He told the court that this was purely an advance from the two companies which he would refund. The learned judge found that the plaintiff did not receive the salaries as of right as the companies were under no obligation to pay the plaintiff during the relevant period. That being the case the sums received by him need not be taken into account in determining his loss of earnings: see *Cunningham* v *Harrison*.[2] The learned judge put the nature of the payments received by the plaintiff from the two companies in this way:

> It could not be said that he was entitled to receive these salaries as of right, as he was not working or performing any services for the companies or either of them. Nor could it be said that the companies paid him the salaries on an ex-gratia basis. But he needed these amounts for his livelihood and expenditure and he therefore drew these amounts from the companies: he said he would refund to the companies whatever amount awarded as loss of earnings. In my view, these amounts could be regarded as advances made to him by the companies in the form of a loan or moneys wrongfully taken by a director without any authority — there was no evidence of any board resolution passed authorizing such payments. In either case he was under an obligation to refund to the companies the amounts received by him.

Mr Michael Kuah for the second defendant submitted that the salaries received by the plaintiff from the companies were as of right. He relied particularly on the IR8A forms issued by the two companies setting out the amounts of salaries paid by the companies to the plaintiff. We did not think that the fact that the payments to the plaintiff by the two companies were reflected in the IR8A forms as salaries necessarily suggested that the salaries were paid to the plaintiff as of right. Much would depend on the arrangements made and the circumstances of the case. What was stated in an IR8A form could not convert what was otherwise a voluntary payment into a payment entitled as of right. In our view, the learned judge was perfectly entitled to find in the circumstances that the payments were not as of right but were only advances made by the companies to the plaintiff. It would be for the companies to make the necessary tax adjustments with the Inland Revenue authorities after the plaintiff had returned the advances to the companies.

The main argument raised by Mr Chan on the question of the quantum of the loss of earnings suffered

by the plaintiff was that as the two companies were family companies and as the plaintiff effectively controlled the two companies, the amounts which the companies paid to him as salaries did not accurately reflect the true worth of the services rendered by the plaintiff to the companies. He argued that the more appropriate way of determining the loss suffered by the plaintiff should be based on the business lost by the two companies on account of the absence of the plaintiff.

It is clear that a director, as such, is not an employee of the company. But a director can hold a salaried employment in addition to his directorship and in that circumstance he will be an employee. It was not in dispute that as an executive director, the plaintiff's work involved financial administration, meeting prospective customers and entertaining them and soliciting business. The business of the two companies was in the shipping field involving loading and unloading and providing supplies to ships. The plaintiff said that the companies suffered losses because of his absence though it was difficult to quantify them. He said that 'this type of business depended mainly on connections that I have with others'. At that period the companies had less business. The plaintiff explained that while no customer left them it was possible that if a customer had several jobs he might have given some jobs to others. He did not look into this aspect specifically and thus was unable to give more definitive answers.

It was never put to the plaintiff that the salaries which he had been receiving from the two companies prior to the accident was in any way fictitious or had no relevance to the value of the services which he rendered to the companies.

Mr Chan submitted that since the plaintiff owned and managed the companies there was really no distinction between him and the companies and the correct measure of damages would be the loss suffered by the companies and not what he drew as salaries from the companies. He suggested that perhaps this could be remitted to the court below to ascertain. Mr Chan relied on the case *Esso Petroleum* v *Mardon*,[3] in particular the passage of Denning MR at p 821 as follows:

> The initial capital of £6,270 was not provided by Mr Marden personally out of his own bank account. It was provided by a private company in which he and his wife held all the shares. It was suggested that this, in some way, prevented Mr Marden from claiming for the loss of it. The judge rejected this suggestion: and so would I. The business of this filling station was undoubtedly the personal business of Mr Marden. The money put into it might be obtained by overdraft from the bank or by loan from his own private company — but wherever it came from, it was a loss to him: and he can recover that loss. It is no concern of ESSO where it came from ...

In our view the issue decided in *Esso Petroleum*[3] was quite different; so were the facts. The passage could in no way be construed to suggest that a shareholder and the company are not distinct and separate entities. What Denning MR said was that how the plaintiff there got his money to invest in the filling station was no concern of the defendant; there was a real loss to the plaintiff and he should be compensated.

Another case relied on by Mr Chan was *Lee* v *Sheard*.[4] The plaintiff suffered injuries as a result of a motor accident. The plaintiff was one of two directors of a private company and he held 49% of the share capital. The plaintiff took an active part in the business of the company. In his absence there was a substantial diminution of turnover and profits of the company which resulted in the plaintiff receiving less profits from the company. One of the heads claimed by the plaintiff as damages was this diminution of the distribution received by him from the company. The trial judge accepted the claim which was affirmed by the Court of Appeal. The defendant there argued that the claim based on diminution of the profits of the company was too remote in law to be recovered. He contended that the party who suffered the loss was the company and not the plaintiff. The Court of Appeal held that this loss was not too remote; it was a real loss to the plaintiff.

Again, we did not see any parallel between *Lee* v *Sheard*[4] and our present case here. The fact-situation and the point of law raised in *Lee* v *Sheard*[4] were different. The plaintiff there did not draw any fixed salary from the company and was claiming for loss based on the reduced profits he received from the company and the point in issue there was whether the claim was too remote.

In the present case, the claim was based simply on salary loss on account of the incapacity caused by the accident. It was never put to the plaintiff at the trial that the salaries he received from the two companies were not genuinely for his services. He was so paid even before the accident as a working director. We were of the view that the learned judge was right to hold that that was the loss the plaintiff had suffered and to make an award accordingly. This was not a case where we ought to pierce the corporate veil.

Appeal dismissed.

Solicitors: *Goh Poh & Partners; Lee & Lee; Mallal & Namazie.*

Reported by *Seah Min Wai*